

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No.451 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA Sd/-
and
HON'BLE MS.JUSTICE H.N.DEVANI Sd/-

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

SHETH CONSTRUCTION CO.

Versus

INCOME TAX OFFICER

Appearance:

1. TAX APPEAL No. 451 of 2004
MR MANISH J SHAH for Appellant No. 1
MRS MM BHATT for Respondent No. 1
-

CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date of decision: 30/12/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1. This appeal is preferred by the assessee against the order dated 01-05-2003 made by the Income-Tax Appellate Tribunal, SMC Bench, Ahmedabad in ITA No.580/Ahd/2000. The appellant has proposed the following two questions stated to be substantial questions of law arising out of the aforesaid order of the Tribunal :-

"(i) Whether on the facts and in the circumstances of the case, the Tribunal was right in law in not sending the matter back to the C.I.T.(Appeals) to decide the issues on merits when in fact the C.I.T.(Appeals) order did not deal with the grounds on merits but allowed Assessee's appeal on a preliminary point?

(ii) Whether on the facts and in the circumstances of the case, the Tribunal was right in law in upholding the validity of the assessment order when the order sent to assessee was not signed by the Assessing Officer ? "

2. At the outset Mr.Manish J. Shah, learned advocate for the appellant, states that he does not press question No.2 as proposed and restricts his submissions in relation to question No.1 only.

3. Heard Mr.M.J. Shah, learned advocate for the appellant and Mrs.M.M.Bhatt, learned Standing Counsel appearing on behalf of the respondent - Revenue.

ADMIT.

4. The following substantial question of law arises for consideration :

"Whether on the facts and in the circumstances of the case, the Tribunal having reversed the order of the C.I.T. (Appeals) on preliminary point, was the Tribunal not required to restore the matter to the file of the C.I.T. (Appeals) for deciding other grounds on merits, which had not been decided by the C.I.T. (Appeals) in the first round?"

5. By consent of the learned advocates for the parties, the matter is taken up for final disposal.

6. The Assessment year is 1994-95 and the relevant accounting period is Financial year ended on 31-03-1994. In the assessment framed on 16-02-1995 the Assessing Officer made addition on account of bad debts of Rs.70,025/- and on account of disallowance of interest payment of Rs.6,580/-. The assessee carried the matter in appeal before C.I.T. (Appeals) challenging both the issues.

7. When the matter came up for hearing before C.I.T. (Appeals), the appellant raised a preliminary objection in the following terms :

"The assessment order passed under sec.143(3) of the I.T. Act, 1961 and served to your appellant is not signed by learned A.O. In the opinion of your appellant, assessment order served without signature of initial A.O. is null and void in view of what is held in following cases :

- a. Kalyankumar Ray Vs. CIT SLP Civil
No.11270 of 1991 Dated 6th August, 1999
191 ITR 634 (SC)
- b. Smt. Kilasho Devi Burman Vs. CIT (1996)
85 Taxman 346 (SC).
- c. Sushil Chandra Goose vs. ITO (1959) 35
ITR 379 (Cal.)
- d. S. Mubarik Shah Naqshbandi vs. CIT
(1977) 110 ITR 217 (J&K). "

The C.I.T. (Appeals) accepted the said preliminary objection and held that "I find that the assessment order is not signed by the Assessing Officer and, therefore, such assessment orders are non-existent in the eyes of law. The order passed under Section 143(3) which is unsigned is, therefore, cancelled." In this view of the matter the original grounds of appeal which challenged the two additions were not dealt with by C.I.T. (Appeals).

8. The Revenue carried the matter in appeal before the Tribunal challenging the finding of C.I.T. (Appeals) that the assessment order was not signed by the Assessing Officer. The Tribunal passed the impugned order on 01-05-2003 after recording absence on part of the respondent - assessee and on the basis of photo copy of the assessment order filed along with the appeal papers, the Tribunal found at the first instance that the C.I.T. (Appeals) did not appear to be justified in striking down

the assessment order in entirety; in the same breath the Tribunal records that when the matter was heard on 27-03-2003 the assessee's counsel had sought 2-3 days time to ascertain the facts and then appear. Accordingly, the case was adjourned to 31-03-2003. The Tribunal records that on the said subsequent day neither the assessee's counsel appeared nor any evidence to controvert the aforesaid factual aspect was furnished. Therefore, the Tribunal found that there was a valid assessment order which bore the signature of the Assessing Officer at two different places, one at the end of the assessment order and one after the office note below the assessment order. In these circumstances, the departmental appeal came to be allowed and the order of the Assessing Officer was restored.

9. The assessee - appellant moved a Misc. Application in which it was stated that on the date of hearing i.e. 27-03-2003 the Tribunal directed the assessee's counsel to obtain instructions in the matter in light of transfer application which was on file of the Tribunal and adjourned the matter to 31-03-2003. It is averred in the Misc. Application that the application was by some other firm having the same name i.e. M/s. Sheth Construction Co. and in the application a request was made to transfer the file to Rajkot Bench of the Tribunal. When the counsel, after going through the application, submitted that the said application pertains to some other assessee, the Tribunal called upon the counsel to tender an application signed by the partners of the assessee - firm that the said application had not been moved by the assessee - firm, and that the hearing on merits of the matter would take place only after receipt of such application. It is further stated in the Misc. Application that between 27-03-2003 to 02-04-2003 as the partners of the assessee - firm were out of station, the application as directed by the Tribunal could not be prepared and submitted. Hence, the counsel did not appear on 31-03-2003. In these circumstances, a prayer was made to recall the order of the Tribunal as the same was against the principles of natural justice.

10. The Tribunal, for the reasons stated in its order dated 05-01-2004, rejected the Misc. Application by referring to what was recorded by it in its earlier order of 01-05-2003.

11. Mr. Manish J. Shah has, in the backdrop of the aforesaid facts, made a fervent plea to restore the matter to the Tribunal so as to enable the Tribunal to decide on merits, the controversy between the parties.

Mr. Shah submitted that the assessee was seeking an opportunity of being heard on the two issues which were not decided by the appellant authorities.

12. Mrs. M. M. Bhatt, learned Standing Counsel appearing on behalf of the respondent - Revenue, supported the order of the Tribunal and submitted that when the department had filed appeal before the Tribunal it was incumbent upon the assessee to have raised cross-objection challenging the decision of the C.I.T. (Appeals) to the extent the C.I.T. (Appeals) had failed to decide the original grounds of appeal. That the assessee having failed to do so, no second innings should be granted to the assessee.

13. The facts narrated hereinbefore are eloquent and need no repetition. It is apparent that the appellant assessee had at no stage given up its right of appeal which is available under the statute. In fact the appellant had challenged the addition and disallowance made by the Assessing Officer on merits before the C.I.T. (Appeals). However, the C.I.T. (Appeals) having entertained the additional ground regarding validity of the assessment order and upheld the same holding the assessment order to be non-existent in eyes of law, there was no occasion for the assessee to file any cross-objection in the Revenue's appeal before the Tribunal. The fact that the assessee had succeeded in entirety cannot be lost sight of and in the circumstances to expect the assessee to prefer cross-objection, may be an ideal situation, but if the said cross-objection was not preferred by the assessee, no fault can be found in the conduct of the assessee so as to disentitle the assessee from obtaining the decision on merits.

14. Once the Tribunal had come to the conclusion that the assessment order had been signed by the Assessing Officer and is valid in eyes of law, while reversing the order of the C.I.T. (Appeals) on this count it was incumbent upon the Tribunal to restore the matter to the file of C.I.T. (Appeals). Possibly, the Tribunal lost sight of this fact due to absence of the counsel of the assessee and the misunderstanding on behalf of the counsel of the assessee in relation to the facts narrated in the Misc. Application. Be that as it may.

15. In light of the circumstances and facts which have come on record, it is apparent that for the purposes of adjudication on merits of the controversy the matter requires to be restored to the file of the C.I.T. (Appeals), as the Tribunal would also have to adopt the

same course of action if the matter is restored to the file of the Tribunal. In the circumstances, without disturbing the finding recorded by the Tribunal as to validity of the assessment order, the matter is restored to the file of C.I.T. (Appeals) so as to enable the C.I.T. (Appeals) to decide the merits of the original grounds of appeal raised by the assessee before him.

16, Accordingly, the question is answered and it is held that the Tribunal ought to have restored the matter to the file of C.I.T. (Appeals) after having decided the preliminary issue against the assessee.

17. The appeal is allowed. There shall be no order as to costs.

Sd/- Sd/-

[D.A.MEHTA, J] [H.N.DEVANI, J]

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'Bhavesh'